IN THE UNITED STATES OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 06-521V
Filed: February 25, 2009
Not for Publication

RAY BALDONADO,	*	
	*	
Petitioner,	*	Credibility of Witnesses,
	*	Contemporaneous Records,
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Neal Jordan Fialkow, Esq., Pasadena, CA, for Petitioner
Heather L. Pearlman, Esq., Washington, DC, for Respondent

ONSET RULING[1]

VOWELL, Special Master:

On July 14, 2006, Mr. Ray Baldonado ["Mr. Baldanado" or "petitioner"] timely filed a petition under the National Vaccine Injury Compensation Act, 42 U.S.C. § 300aa-10 *et seq*.,[2] alleging that the influenza vaccination he received on November 18, 2003,

[1] Because this unpublished ruling contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

[2] Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. 300aa (2000 ed.).

was the cause of a "Table Injury"[3] known as brachial neuritis or alternatively, the tetanus vaccine was a cause in fact of the brachial neuritis.[4] Petitioner later clarified that the reference to "tetanus vaccine" was an error, and conceded that brachial neuritis was not a Table injury with regard to the influenza vaccine. *See* Order, dated October 16, 2005. The case henceforth proceeded as an "off-Table" case, based on the allegation that the influenza vaccine caused petitioner to develop brachial neuritis.

There were a number of conflicts between the affidavits filed by Mr. Baldonado[5] and the contemporaneous medical records concerning the actual onset of his condition. As the timing of onset of Mr. Baldonado's condition appears to be a critical factor for the expert opinions on causation, and thus, for determining Mr. Baldonado's entitlement to compensation, I ordered a hearing to resolve the discrepancies. At the October 30, 2008 hearing in San Bernardino, CA, I heard testimony from Mr. Baldonado and two former co-workers, Mr. Macias and Ms. Castanon, concerning the onset of his symptoms.

Conflicts between contemporaneous medical records and subsequent statements, testimony, and medical histories are common in Vaccine Act cases. Two general legal principles guide the resolution of conflicts between contemporaneous records and later-adduced evidence. The first is that the absence of a reference to specific symptoms in a medical record does not conclusively establish the absence of symptoms during that time frame. *See, e.g., Murphy v. Sec'y, HHS*, 23 Cl. Ct. 726, 733 (1991), *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 974 (1992) ("[T]he absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.").

The second principle addresses the degree of reliance commonly accorded to contemporaneous records. Special masters frequently accord more weight to contemporaneously recorded medical symptoms than those recounted in later medical histories, affidavits, or trial testimony. "It has generally been held that oral testimony

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[3] A "Table" injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified.

[4] For purposes of a Vaccine Table injury, brachial neuritis "is defined as a dysfunction limited to the upper extremity nerve plexus...without involvement of other peripheral... or central...nervous system structures." The Qualifications and Aids to Interpretation further elucidate the presenting symptoms: " A deep, steady, often severe aching pain in the shoulder and upper arm usually heralds onset of the condition. The pain is followed in days or weeks by a weakness and atrophy in upper extremity muscle groups. ...The neuritis, or plexopathy, may be present on the same side as or the opposite side of the injection; it is sometimes bilateral, affecting both upper extremities." 42 C.F.R. 100.3(b)(7). Although this definition and description is directly applicable only to the Table injury after tetanus vaccination, it is useful in considering Mr. Baldonado's symptoms.

[5] These included Mr. Baldonado's own affidavit, Petitioner's Exhibit ["Pet. Ex."] 2, and three from co-workers, Christina Castanon, Robert Macias, and Sergio Ortega, filed as Pet. Exs. 11, 12, and 13, respectively, on January 3, 2007.

which is in conflict with contemporaneous documents is entitled to little evidentiary weight." *Murphy,* 23 Cl. Ct. at 733 (1991). *See also Cucuras v. Sec'y, HHS*, 993 F.2d 1525, 1528 (Fed. Cir. 1993). Memories are generally better the closer in time to the occurrence reported and when the motivation for accurate explication of symptoms is more immediate. *Reusser v. Sec'y, HHS*, 28 Fed. Cl. 516, 523 (1993). Inconsistencies between testimony and contemporaneous records may be overcome by "clear, cogent, and consistent testimony" explaining the discrepancies. *Stevens v. Sec'y, HHS*, No. 90-221V, 1990 WL 608693, at *3 (Fed. Cl. Spec. Mstr., Dec. 21, 1990). *See also Burns v. Sec'y, HHS*, 3 F.3d 415, 417 (Fed. Cir. 1993) (decision to credit contemporaneous medical records over oral testimony "uniquely within the purview of the special master."). This is consistent with the rationale behind the rule of evidence that gives medical records an exception to the hearsay rule.

However, where the medical records are inconsistent, the circumstances suggest that the records are inaccurate or incomplete, or when there are cogent reasons for them to be less reliable than other testimony, the medical records are entitled to less weight. In this case, the histories provided in the medical records are themselves in conflict, and the symptoms for which treatment was sought were not the symptoms which, in hindsight, marked the first manifestation or symptom of onset of a potential vaccine injury. For these reasons, the medical records here are less reliable as evidence of the time of onset of the symptoms. In this case, testimony from witnesses concerning their own observations of the onset of symptoms provided sufficiently clear and cogent reasons to warrant placing less reliance on the contemporaneous records than those records might otherwise be accorded. Here, two former co-workers provided corroboration of Mr. Baldonado's own account of the onset of symptoms consistent with brachial neuritis at a time prior to that recorded in the medical records.

At the conclusion of the onset hearing, I issued a bench ruling setting forth my factual findings with regard to onset of Mr. Baldonado's condition. The parties have requested a written ruling regarding onset of Mr. Baldonado's condition. With regard to onset, the following findings of fact replace those issued at the onset hearing and are presented with the above legal principles in mind.

1. In November, 2003, Mr. Baldonado was employed as a production supervisor at a manufacturing plant. Onset Transcript ["Tr."] at 6.

2. On November 18, 2003, Mr. Baldonado received an influenza vaccination in his left deltoid muscle at his job site, which is within the United States. Tr. at 6-8. Robert Macias ["Mr. Macias"] witnessed Mr. Baldonado's influenza vaccination immediately after his own. Tr. at 133.

3. After the vaccination, Mr. Baldonado experienced pain at the site of the injection for about one week. Tr. at 8-11. He reported this pain to Christina Castanon ["Ms. Castanon"] the day of the vaccination, commenting that it felt as if the needle was still in his arm. Tr. at 10-12, 74, 178. He was still complaining of pain at the injection

site the following day. Mr. Macias had a telephone conversation with Mr. Baldonado two or three days after the vaccination. During that conversation, Mr. Baldonado reported continuing pain at the site of his vaccination, and he asked if Mr. Macias was also. Tr. at 141-42.

4. Around November 20, 2003, Mr. Baldonado experienced muscle pain surrounding the injection site. Tr. at 11-12, 76. The arm pain caused him to rub or squeeze his arm throughout the day, which was observed at various times by a number of people at his workplace. Tr. at 13. Ms. Castanon testified credibly as to her own observations of Mr. Baldonado rubbing his arm in the days to weeks after his vaccination. Tr. at 178-80.

5. The feeling that the needle was still in the arm disappeared after about seven to eight days, although the left arm pain persisted. Tr. at 74.

6. During the first week of December, 2003, Mr. Baldonado began feeling an aching sensation that developed into severe pain in his right shoulder. Tr. at 14, 17-19, 23, 78-79. It became painful to lift his arm or shoulder sometime around December 10-15, 2003. Tr. at 81. Mr. Macias testified that he saw Mr. Baldonado about two or three weeks after the vaccination, and observed him to be in pain and rubbing his right shoulder. Tr. at 135-36. Ms. Castanon also credibly testified that about two and one-half weeks after the vaccination, Mr. Baldonado was complaining of deep shoulder pain. Tr. at 179-80. She observed him rubbing his shoulder every time she saw him after about mid-December. Tr. at 183.

7. Mr. Baldonado initially believed that the shoulder pain was caused by a pulled muscle and treated it with aspirin, Ben-Gay ointment, heat, and massages. Tr. at 18-19, 24, 29-30, 33. His shoulder was so painful that he could not lift his right arm. Tr. at 18-19. Once the pain began in the right shoulder, Mr. Baldonado did not focus on the left arm pain, and, at some point after the onset of the right shoulder pain, the left arm pain became less noticeable or disappeared. Tr. at 79.

8. The right shoulder pain grew worse over the next several weeks. By Christmas, he was in a great deal of pain. Tr. at 23-24. He rubbed ice on the shoulder, continued to apply Ben-Gay ointment, and put weights on his arm to try to relieve the pain. Tr. at 30-31. During the time between onset of his shoulder pain and Christmas, Mr. Baldonado received about 15 or 20 massages from Ms. Castanon. Tr. at 88, 181.

9. Mr. Baldonado did not call or see a doctor, although his complaints about arm pain to Mr. Macias prompted encouragement to do so. Mr. Macias testified credibly that he observed Mr. Baldonado behaving as if he were in pain during this same general time frame. Tr. at 158-61,169. Mr. Baldonado resisted efforts to get him to see a doctor earlier because he thought the problem “would work itself out.” Tr. at 33, 183.

10. On December 19, 2003, Mr. Baldonado attended a management meeting with Mr. Macias and others. At the meeting, he wrote a note to Mr. Macias, indicating that his shoulder was hurting. Mr. Macias again suggested that he go to the doctor. Tr. at 49-51, 139-40.

11. About three to four weeks after the vaccination, Mr. Baldonado began to feel shortness of breath upon lying down. This was a gradual process. Tr. at 24-25. By the time of a vacation in Nevada from December 30-31, 2003, Mr. Baldonado was having shortness of breath while walking around, not simply when lying down. Tr. at 27-29. Ms. Castanon noticed that Mr. Baldonado was having breathing difficulties around the end of December, 2003. Tr. at 183-84.

12. The holiday season permitted Mr. Baldonado to date the pain and shortness of breath with a greater degree of reliability than otherwise, given the passage of time between the symptoms and Mr. Baldonado's testimony, particularly given his problems as an historian. He did not recall any significant problem at Thanksgiving, other than rubbing his arm (Tr. at 123, 127), but by Christmas, he had significant pain. Tr. at 124. I found his recollection that, on Christmas Eve, the pain and breathing problems prevented him from dressing up as Santa Claus (Tr. at 26, 124) to be highly credible and believable.

13. On January 7, 2004, the shoulder pain became so severe that Mr. Baldonado left work and saw Dr. Otsuki. Tr. at 35-36. By this time, he could no longer breathe well when lying on his back. Tr. at 48.

14. In the week after the January 7, 2004, visit to Dr. Otsuki, Mr. Baldonado began having left shoulder pain and tingling in his left hand. Tr. at 95-97. Ms. Castanon was massaging both shoulders for Mr. Baldonado after about the first week of January, 2004. Tr. at 185-86.

15. Mr. Baldonado was in severe pain when he went to the urgent care clinic on January 24, 2004. Tr. at 92.

16. When he went to the emergency room on January 26, 2004, the shoulder pain was still severe, but his breathing problems were worse, and he had developed chest pain in addition to the shoulder pain. Tr. at 92-93. 101-02. The breathing and shoulder pain he was experiencing was "like I was having a heart attack." Tr. at 94. The breathing problems and chest pain were what triggered the hospital visit. At this point, Mr. Baldonado was having pain in both shoulders, but the left shoulder pain was more concerning to him, because it was on the same side as his heart. Tr. at 95-96.

17. There were a number of inconsistent histories of onset of various symptoms in the medical records. Some of these histories were undoubtedly provided by Mr. Baldonado. Some appear to be regurgitations of previous accounts from his medical records.

18. The first medical record places onset in late December, 2003, or early January, 2004, but that record focuses on the right neck pain and shortness of breath, not on the initial left arm tenderness followed by right shoulder pain. Petitioner's Exhibit 10, page 4, concerns the January 7, 2004 visit to Dr. Otsuki. It documents shortness of breath and shoulder pain, but does not indicate an onset. The one-week onset of shortness of breath recorded later in that medical record is consistent with Mr. Baldonado's testimony that during his Nevada vacation, the shortness of breath became sufficiently severe so as to interfere with walking around, not simply sleeping.

19. The January 24, 2004 urgent care visit recited that the left shoulder pain had persisted for three weeks. Pet. Ex. 10, p. 27. This record is somewhat inconsistent with the January 7, 2004 medical record, which placed onset in late December or very early January, 2004.

20. The January 26, 2004, emergency room visit records variously reflect chest pain for three days (Pet. Ex. 10, p. 31) and for one week (*id.*, p. 32). This record was self-contradictory, reflecting both that Mr. Baldonado had and did not have previous medical visits for similar symptoms. *Id.*, p. 35. A medical record that records two mutually exclusive occurrences is inherently unreliable.

21. The February 2, 2004 history taken at a clinic visit the day prior to Mr. Baldonado's four-day hospitalization reflected shortness of breath for ten days–a history that was incorrect, both based on the earlier records and the onset hearing testimony. Pet. Ex. 10, p. 13. The February 3, 2004 admission history placed onset of shortness of breath approximately 15 days earlier. *Id*., p. 6. Once again, this was an incorrect history, based on the January 7, 2004 medical record (*id.*, p. 4), let alone on the hearing testimony.

22. The discharge summary from the February 3-6, 2004 hospitalization focused on a shortness of breath that had gradually increased over three weeks prior to admission. Pet. Ex. 10, p. 9. The pulmonary consult during that admission places onset of shoulder pain at about four weeks earlier. *Id*., p. 24. This pulmonary consult documented right shoulder pain beginning four weeks earlier, followed by a shift in the pain to the left shoulder, which also lasted for about a month, and shortness of breath for three weeks. *Id.* The infectious disease consult placed onset of right shoulder pain and shortness of breath two weeks prior to this hospital admission. *Id*., p. 18. The neurology consult reflected a two-week history of right shoulder pain. *Id*., p. 27. Again, these records are inconsistent with both the earliest medical records and the hearing testimony.

23. On February 19, 2004, Mr. Baldonado's pulmonologist, Dr. Chen, took another history. He noted a "flu shot" in October, 2003 (the vaccination actually occurred on November 18, 2003), with pain at the injection site, followed by pain in the right clavicle area. This record substantiates the testimony about Mr. Baldonado's pain at the injection site, followed by right shoulder pain. Unfortunately, this record does not

indicate when the right clavicle pain began. Pet. Ex. 10, p. 45.

24. In May, 2004, a record reflects onset of the symptoms as "a few weeks after the influenza shot." Pet. Ex. 10, p. 54.

25. In August, 2004, a record reflects good health until November, 2003, which is consistent with Mr. Baldonado's testimony. Pet. Ex. 14, p. 26. It also places onset of his symptoms at about a month after the flu shot, yet another reflection of Mr. Baldonado's problems as a historian.

26. There are also obvious inconsistencies among the accounts of the three witnesses who testified. Given the length of time, I would be surprised if there were not. Although the details they remember differ slightly from one another and from their previous affidavits, I do not find the differences in the details to be significant or important. The witness accounts of which shoulder the pain began in are inconsistent, but as Mr. Baldonado had pain in both shoulders at various times in December, 2003 and January, 2004, this inconsistency is not material, because the shoulder in which the pain began is not significant in determining vaccine causation. *See* 42 C.F.R. 100.3(b)(7).

27. With regard to inconsistencies between their testimony and the medical records regarding onset, Dr. Hogen's observation that the answer you get depends on how the questions are framed is quite apropos of the situation that existed with Mr. Baldonado and his health care providers. Pet. Ex. 16, p. 2. A layman would be unlikely to connect shoulder pain on the side opposite from that in which he received a vaccination with that vaccination. Shoulder pain is a symptom that many would ascribe to muscle sprain or strain and a symptom that would not necessarily send someone who disliked going to a physician (Tr. at 33) to a doctor's office.[6] Severe shoulder pain and shortness of breath triggered the January physician's visit.

28. In a man of Mr. Baldonado's age and physical condition, a complaint of shortness of breath is likely to focus a health care provider's attention on cardiac or pulmonary problems, not on brachial neuritis or the onset of shoulder pain. Given his shortness of breath, the doctors were looking for horses, not zebras. Chest pain is an uncommon symptom for brachial neuritis, which is in itself an uncommon condition.

29. I agree with Mr. Fialkow (Tr. at 204) that Mr. Baldonado is not a good historian. He may have even been less than frank in his testimony about what he told doctors in January and February of 2004. Based on Mr. Baldonado's testimony alone, I am not confident that I could place onset of his symptoms in either late November (pain

[6] Shoulder pain itself is an uncommon symptom of brachial neuritis, at least according to one article filed. *See* J. Miller, *et al., Acute Brachial Plexus Neuritis: An Uncommon Cause of Shoulder Pain*, AM. FAMILY PHYSICIAN, November 2000, filed as Pet. Ex. 15, Tab 4.

surrounding the injection site) or early-mid December, 2003 (pain in the right shoulder). However, his accounts of what he felt in the weeks immediately after his vaccination were corroborated by the testimony of his former co-workers. Given the inconsistencies among the medical records regarding the nature of his symptoms and when they manifested, I cannot accord those records the degree of deference I normally accord more contemporaneous accounts of injuries and symptoms. I also note that one February, 2004 record documented the pain at the injection site, followed by right shoulder pain.

30. Based on the testimony of Mr. Baldonado, as corroborated by Mr. Macias and Mrs. Castanon, I place onset of Mr. Baldonado's shoulder pain between early and mid December, 2003. I place onset of his arm pain within one week of his vaccination.

31. For purposes of determining onset, it is not necessary to make factual findings concerning the remainder of Mr. Baldonado's medical care, treatment, and diagnosis. The parties have agreed that Mr. Baldonado's correct diagnosis is brachial neuritis. Tr. at 4.

The parties shall provide a copy of these findings to any expert witness who has been or will be retained in this case. Any expert reports filed after the date of this onset ruling shall indicate that the opining expert received a copy of these factual findings. Any expert witness who testifies in any subsequent hearing shall acknowledge in testimony or in writing receipt of these factual findings.

IT IS SO ORDERED.

Denise K. Vowell
Special Master